

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Comment Sought on Streamlining)	WT Docket 16-421
Deployment of Small Cell Infrastructure)	
by Improving Wireless Facilities Siting)	
Policies;)	
)	
Mobilitie, LLC Petition for Declaratory)	
Ruling)	

To: The Commission

**REPLY COMMENTS OF THE NAVAJO NATION TELECOMMUNICATIONS
REGULATORY COMMISSION (NNTRC)**

The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), through undersigned counsel, and pursuant to Sections 1.415 and 1.419 of the Commission’s rules (47 C.F.R. §§ 1.415 & 1.419) submits these Reply Comments in the above-referenced proceeding and in response to the Commission Public Notice DA 16-1427, released December 22, 2016 (the “*Streamlining Deployment PN*”).¹ These Reply Comments focus on comments filed by a number of carriers and carrier associations seeking to amend, or simply dispense with, the Section 106 process which acts to protect Tribal sovereignty and protect areas of religious or cultural importance to Native American Tribes. In support of these Reply Comments, NNTRC submits:

I. BACKGROUND

As the largest Native American Indian Reservation in the United States, the Navajo Nation has been particularly disadvantaged by Federal and state communications policies. The Navajo Nation consists of 17 million acres (26,111 square miles) in portions of three states—

¹ By an *Order*, DA 17-51, released January 12, 2017, the Commission extended the comment and reply comment date to March 8, 2017 and April 7, 2017, respectively.

Arizona, New Mexico, and Utah. The Nation is comparable in size to West Virginia. Were it a state, the Navajo Nation would rank 4th smallest in population density; only Montana (6.5 persons per square mile), Wyoming (5.4) and Alaska (1.2) are less densely populated.²

The NNTRC was established pursuant to Navajo Nation Council Resolution ACMA-36-84 in order to regulate all matters related to telecommunications on the Navajo Nation.

Telecommunications is defined broadly under the Navajo Nation Code to include broadband and “any transmission, emission or reception (with retransmission or dissemination) of signs, signals, writings, images, and sounds of intelligence of any nature by wire, radio, light, electricity or other electromagnetic spectrum.”³ Its purpose is to service, develop regulation and to exercise the Navajo Nation’s inherent governmental authority over its internal affairs as authorized by the Navajo Nation Council and the Navajo Telecommunications Regulatory Act.⁴

NNTRC is specifically authorized, pursuant to the Navajo Telecommunications Regulatory Act, to act as the intermediary agency between the Navajo Nation and the Federal Communications Commission, including representing the Navajo Nation in proceedings before the Commission, intervening on behalf of the Navajo Nation on matters pending before the Commission, and filing comments in rule making proceedings.

II. DISCUSSION

NNTRC’s Reply Comments are directed at the attempt by several carriers⁵ and associations⁶ to sweep into this proceeding the FCC’s rules established to implement the

² Compare http://en.wikipedia.org/wiki/List_of_U.S._states_by_area (states ranked by geographic area) with http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density (states ranked by population density).

³ 21 N.N.C. § 503 (V).

⁴ Codified at 2 N.N.C. §§ 3451 -55; 21 N.N.C. §§ 501-529.

⁵ See Comments of Sprint, filed March 8, 2017; Comments of Mobilitie; Comments of Verizon; Comments of NTCH.

National Historic Preservation Act (NHPA) of 1966, and specifically the requirements under Section 106 that carriers consult with Tribes before building in areas that may have religious or cultural significance to a Tribe. Under the guise of “streamlining,” carriers seek to avoid their responsibilities under both statute and FCC rules.

A. Revamping the Section 106 Process Was Not Requested in the Mobilitie Petition Nor Raised in the Commission’s Public Notice

Neither the Mobilitie Petition nor the *Streamlining Deployment PN* proposed amending the Section 106 NHPA process. Nonetheless, several carriers and carrier associations are using this proceeding to attempt to gut a carefully crafted regime that was put into place more than a decade ago with the National Programmatic Agreement (NPA).⁷ The Nation objects to this and calls upon the FCC to reject these attempts outright. Under its trust relationship with Tribes,⁸ before the Commission contemplates making any changes to the Section 106 process, it must engage Indian Country in a government-to-government consultation process. Changing decades of hard work cannot be accomplished in the “backdoor” manner requested by carriers.⁹

B. Any Changes to the Section 106 Process Must be Done Carefully and Only After Careful Consideration of the Rights of Tribes and the Responsibilities of the FCC

In their desire to reduce their costs and allegedly speed deployment of next generation wireless services (4G and 5G), carriers point to supposed abuses of the Section 106 process to argue that their needs should take precedence over the statute and the rights of Tribes to protect

⁶ See Comments of CTIA; Comments of Competitive Carrier’s Association.

⁷ See 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process § II.A.1 (NPA).

⁸ See, *Statement of Policy on Establishing Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd. 4078 ¶ 1 (2000).

⁹ NNTRC understands that the FCC is contemplating adopting a Notice of Proposed Rule Making (NPRM) in WT Docket Nos. 17-79 and 15-180 that would begin the process of examining the issues raised by carriers concerning the Section 106 process. Those proceedings are far better suited than this proceeding to address these highly sensitive issues.

their religious and culturally sensitive areas.¹⁰ Carriers claim that the Section 106 process rarely results in the need to change sites or otherwise protect Tribal areas, especially when it comes to deploying small cell technology.¹¹ Yet even Verizon must admit that the Section 106 process **does result** in findings of adverse effect on Tribal lands.¹² 29 instances of adverse findings are not insignificant to each of those affected Tribes. If even one example of an adverse effect can be found through the Section 106 process, then the FCC must move slowly and carefully in changing the process and/or relieving carriers of their obligations under Section 106.

Carriers also complain about the cost of the Section 106 process and interfacing with Tribal Historic Preservation Officers (THPOs).¹³ The Commission needs to consider this issue from the perspective of the Tribe. It is the Tribe that must appoint a THPO and pay the salaries and expenses related to that office. As noted above, the Navajo Nation is the size of the state of West Virginia. The Navajo Nation Heritage and Historic Preservation Department (NNHHPD) has a staff of 22, and NNHHPD employs only 3 staff to conduct Section 106 reviews.¹⁴ Given

¹⁰ See, e.g. Comments of NTCH, p. 1; Comments of Verizon, p. 35; Comments of Mobilitie, pp. 3-4; Comments of Competitive Carrier Association, p. 10.

¹¹ See, e.g., Comments of CTIA at p. 5 (“Given that wireless facilities deployment in many cases – particularly with regard to small cells – poses no risk to tribal interests, the current breadth of tribal reviews, the delays that are endemic to those reviews, and the substantial fees that providers find they must pay to secure approvals, all pose unnecessary barriers to network deployment nationwide”); Comments of Mobilitie, pp. 3-4 (“there is no basis for tribes to seek reviews or to request fees for small cells, because when these facilities are installed in an active right of way they rarely if ever could affect tribal interests”); Comments of Sprint, p. 44 (“the good intentions to protect important sites have led to spiraling costs at sites with no chance of having an adverse impact on a site that meets the criteria under the FCC’s Nationwide Programmatic Agreement of eligibility for inclusion on the National Register of Historic Places”).

¹² Comments of Verizon, p. 36 (“Of 8,100 requests for tribal review submitted between 2012 and 2015, only 29 (.3 percent) resulted in findings of an adverse effect to tribal historic properties, and there were no adverse effects from projects with no new ground disturbance”).

¹³ See, e.g. Comments of NTCH, p. 1; Comments of Verizon, p. 35; Comments of Mobilitie, pp. 3-4; Comments of Competitive Carrier Association, p. 10.

¹⁴ In addition to receiving notifications for proposed new builds within the recognized border of the Navajo Nation, the Nation also receives notification for projects outside of the Reservation Boundary

that it is the carriers who seek access to our lands to build their infrastructure, the economic burden of disrupting Navajo culture and our way of life in order to allow a carrier to “provide services to the people,” or more accurately, for the carrier to profit from the customers living and working within the Nation, should not fall on the Navajo people. If carriers were contributing facilities to the Navajo Nation, or sharing revenues with the Nation, that would be a different situation. But merely claiming that the services they offer (and profit from) will benefit the Navajo people is not enough to shift that economic burden onto the Navajo government. Carriers should be required to compensate Tribes for the cost of reviewing requests to place infrastructure on Tribal lands, and that simply can’t be done for \$25.00 per site, as Verizon suggests.¹⁵ To the extent that there are Tribes that do seek to “profit” from the Section 106 process, carriers have the right to file a grievance with the FCC against that particular Tribe. A few instances of Tribal overreach provide no basis to change a process that has served both Tribes and carriers well for over a decade.

C. Carriers Must Address the Continuing Problem of “Twilight Towers” and Towers Without Leases

Carriers in this proceeding claim that they need relief from a burdensome Section 106 process in order to bring the next generation of wireless service to all Americans. They claim to be good corporate citizens who are unjustly faced with an overly burdensome regulatory system.¹⁶ They further claim to have the best interests of Tribes at heart, and claim to be protecting the cultural and religious heritage of Tribes. What carriers don’t want to talk about,

through the TCNS system, both through the TCNS database, as well as through regular mail. While not every site off the reservation will need to be reviewed, it is imperative that the Nation have the opportunity to make the decision as to its own sacred sites.

¹⁵ Comments of Verizon, p. 35.

¹⁶ See, e.g., Comments of Sprint, p. 44, 49 (“Sprint supports strong environmental protections and works diligently to minimize the effects of our business on the environment”); Comments of CCA, p. 10; Comments of Verizon, p. 34.

and haven't wanted to talk about for decades, are all the "twilight towers"¹⁷ and towers that have no current leases that exist on Tribal lands. Carriers for generations abused FCC and BIA processes in building infrastructure that crisscrossed Indian Country without seeking proper authority. They have continually stalled in resolving this issue. If carriers want the cooperation of Tribes in relief from some Section 106 burdens, then they have got to come the table willing to take responsibility for their past actions and current lease-less operations before another generation of technology, and people, pass by. Given the way that some carriers have treated Tribes, it is no wonder that many Tribes are skeptical when carriers claim their 4G and 5G deployments don't need Section 106 review. These are the same companies that generations ago claimed that they didn't need Tribal approval to build on Tribal lands.

D. Any Changes to the Section 106 and NHPA Process Must Come With Enforceable Promises on the Part of Carriers to Deploy Next Generation Services into Indian Country

At the same time carriers seek extensive relief from the Section 106 process, there is no evidence that those same carriers are poised to begin deploying 4G or 5G service in Indian Country (other than possibly along major roads and highways that bisect reservations). The evidence that delivering telecommunications and broadband services to Indian Country is more costly and more difficult than delivering comparable services to urban areas is compelling:

2000: "Since the passage of the Telecommunications Act of 1996, the Federal Communications Commission has made particular efforts to ensure that all Americans, in all regions of the United States, have the opportunity to access telecommunications and information services. Notwithstanding such efforts to promote ubiquitous service, the Commission has recognized that certain communities, particularly Indian reservations and Tribal lands, remain underserved, with some areas having no service at all."¹⁸

¹⁷ "Twilight Towers" are those towers built between March 16, 2001 and March 7, 2005, which were not required to submit to a Section 106 review.

¹⁸ See, Statement of Policy on Establishing Government-to-Government Relationship with Indian Tribes, 16 FCC Rcd. 4078 ¶ 1 (2000).

- 2010: The *National Broadband Plan* noted the challenges of bring telecommunications and broadband services to Indian Country because of “high build-out costs” and “limited financial resources that deter investment by commercial providers.”¹⁹
- 2011: *Native Nations Notice of Inquiry*: “Native Nations face unique problems in acquiring communications services, particularly broadband high-speed Internet service. Substantial barriers to telecommunications deployment are prevalent throughout Tribal lands. Those barriers include rural, remote, rugged terrain and areas that are not connected to a road system that increase the cost of installing infrastructure, limited financial resources to pay for telecommunications services that deter investment by commercial providers, a shortage of technically trained Native Nation members to plan and implement improvements, and difficulty in obtaining rights-of-way to deploy infrastructure across some Tribal lands. It is thus not surprising that critical infrastructures rarely have come to Tribal lands without significant federal involvement, investment, and regulatory oversight.”²⁰
- 2011: *2011 USF/ICC Transformation Order*: “[v]arious characteristics of Tribal lands may increase the cost of entry and reduce the profitability of providing service, including: (1) The lack of basic infrastructure in many tribal communities; (2) a high concentration of low-income individuals with few business subscribers; (3) cultural and language barriers where carriers serving a tribal community may lack familiarity with the Native language and customs of that community; (4) the process of obtaining access to rights-of-way on tribal lands where tribal authorities control such access; and (5) jurisdictional issues that may arise where there are questions concerning whether a state may assert jurisdiction over the provision of telecommunications services on tribal lands.”²¹
- 2016: *GAO Report on Challenges to Broadband Deployment on Tribal Lands*: “Access to Internet on tribal lands varies but challenges to access and adoption remain. The high costs of infrastructure buildout on tribal lands, which tend to be remote and rugged terrain, work in tandem with tribal member poverty to create a barrier to high-speed Internet expansion on tribal lands.”²²

Many parts of the Navajo Nation lack 3G service, let alone 4G. The FCC’s response to its own admissions has been underwhelming. In the six years since the *USF/ICC Transformation*

¹⁹ FCC, *Connecting America: The National Broadband Plan*, at 152 (2010) (*National Broadband Plan*).

²⁰ Improving Communications Services for Native Nations, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672, para. 1 (2011) (*Native Nations NOI*).

²¹ *In re Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 17820, para. 482 (2011) (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12208, 12226, para. 32 (2000)).

²² 9 U.S. Gen. Accountability Off., GAO-16-222, *Telecommunications: Additional Coordination and Performance Measurements Needed for High-Speed Internet Access Programs on Tribal Lands* at 1 (Feb. 3, 2016) (GAO Report) at 29.

Order was adopted, a mere \$50 million in new money has gone into infrastructure development specifically targeting Indian Country through the Tribal Mobility Fund Phase I reverse auction, and some \$30 million of that went to companies serving Alaska. If carriers want Tribes to work with and negotiate a streamlined process under the Section 106 process, then they must be willing to stand up and promise that they will deploy future generations of technology into Indian Country, and not just along major highways and in the most highly populated areas of reservations. An enforceable commitment on the part of carriers to such deployment would go a long way in convincing Tribes to give up some of their rights under Section 106 of the NHPA.

E. Federal Indian Law Sets Requirements for Leasing on Indian Lands, Rights-of-Ways, and Environmental and Cultural Reviews; Expedited Reviews at Navajo

Most commenters in this proceeding totally gloss over the fact that the National Programmatic Agreement and its amendments do *not* apply on Tribal lands.²³ Instead, Federal Indian Law is applicable to such actions through regulations related to Rights-of-Way (ROWs) and tower leases. The BIA determined that telecommunications towers required leases and the Nation has been processing new towers and renewals as leases. 25 CFR §415(e) permits the Navajo Nation to lease tribal lands without needing BIA approval, so long as the Nation's implementing regulations have BIA approval, which has been obtained.²⁴

²³ At least Verizon acknowledges this in its comments and does not seek to attempt to alter Federal Indian Law through this proceeding. *See* Comments of Verizon, n94 (“This process does not apply to projects located on tribal lands or projects that fall within an existing exclusion from historic preservation review. Projects on tribal lands are reviewed only by the tribe on whose land the project will be located, so there is no need to notify other tribes through TCNS. Verizon is not seeking any changes to the process for reviewing projects on tribal lands”).

²⁴ See 25 C.F.R. §415(e)(1). On May 16, 2014, the Assistant Secretary of the Bureau of Indian Affairs approved the Navajo Nation General Leasing Regulations of 2013, found at 16 N.N.C. §2301 et seq. In order to lease lands without BIA approval, the Nation needed to develop specifications in the tribal code to the satisfaction of the Secretary.

Most companies request access to Rights-of-Ways (ROWs), and here the Nation will provide brief clarification to the carriers to explain their ability to access pre-existing ROWs on Indian Lands. The federal regulations governing ROWs on Indian Lands do not grant liberal, unrestricted access and in fact require quite a cumbersome federal process, which is governed by the BIA and cannot be overridden by another federal agency. In 2016, the Bureau of Indian Affairs finalized amendments to the Rights-of-Way regulations, whereby all ROWs have to be approved by the Bureau of Indian Affairs,²⁵ and the applicant *must* obtain tribal permission.²⁶ An existing ROW may be utilized for telecommunication purposes only under certain conditions—if the preexisting ROW includes in its purpose telecommunications, an amendment would need to be obtained to add the new tenant. If a carrier wishes to co-locate on another structure within a ROW of another grantee, if the stated purpose does not include telecommunication equipment, the company must apply for a new ROW.²⁷

Although leasing on Navajo Nation lands is no longer considered a major federal action requiring BIA approval, the Navajo Nation General Leasing Regulations requires the Nation to have two reviews: a biological review and a cultural review. These are one-page forms (called Biological Resources Compliance Form and Cultural Resources Compliance Form). The review time for this form can be a matter of seconds if the reviewer is intimately familiar with the area to the time it takes to complete a full field site visit if the area has never been disturbed. Over the last year, the Nation has also gone to great lengths to expedite the process by creating a department solely for handling telecommunications leases (General Land Development Department, or GLDD). To further expedite the process, a new electronic review system has

²⁵ 25 C.F.R. §169.101(a).

²⁶ 25 C.F.R. §169.107 (emphasis added). These requirements are not new.

²⁷ See 25 C.F.R. §169.127; §169.204.

been created whereby the companies can upload documents, where delivery is instantaneous and all reviewers receive the documents for review simultaneously, as opposed to hand delivering a paper packet down the entire chain of reviewers.

III. CONCLUSION

The Navajo Nation has a long history of encouraging telecommunications carriers to come onto its lands to deploy infrastructure, so long as such carriers respect the sovereignty and cultural rights of the Navajo people. The Nation stands ready to work with carriers to expedite, as much as possible, the ROW and leasing processes, given the somewhat awkward and cumbersome process imposed on the Nation by federal agencies beyond the FCC. Carriers cannot use the FCC to do an “end around” on other federal statutes, however, and the FCC should reject attempts to gut the Section 106 process in this proceeding.

Respectfully submitted,

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